

REMARKS

Claims 21-39 are pending in the application.

Rejection of Claims 26, 32, and 38 under 35 U.S.C. §112, Second Paragraph

Claims 26, 32, and 38 have been rejected under 35 U.S.C. §112, second paragraph as failing to particularly point out and distinctly claim the subject matter which Applicant regards as his invention. Specifically, the Examiner objects to the use of the trademark/trade name "VELCRO®" in these claims. In response, Applicant has cancelled each of the claims at issue.

Rejection of Claims 34-38 Under 35 U.S.C. §103(a) over Curtiss

Claims 34-38 stand rejected under 35 U.S.C. §103(a) for obviousness in view of the Curtiss reference. The Examiner considers Curtiss to disclose the claimed invention except that Curtiss' cover is cylindrical and lacks four defined sidewalls. She contends that Curtiss's cover may be made of burlap, which she considers to be resistant to frost but to substantially allow air, water, and light to pass through. She admits that Curtiss does not teach the use of four sidewalls, as claimed, but contends that it would have been obvious to one of skill in the art to change the shape or form of the cover since there is no invention in merely changing the shape or form of an article without changing its function.

Applicant traverses the rejection and submits that the Examiner has not made a *prima facie* case for obviousness in this instance. "To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art." *In re Royka*, 490 F.2d 981 (CCPA 1974); MPEP 2143.03.

As the Examiner admits, Curtiss does not teach or suggest the four sidewalls feature of the claimed method. The Examiner points to no motivation or suggestion within the art to make the modification that would result in the claimed invention. The Examiner's opinion that "there is no invention" in the substitution of four sidewalls for a conical surface appears to be a way of merely stating that such a change would be an obvious variation. However, this begs the question of where the suggestion to make the change is. Applicant submits that without such a suggestion within the art, there is no obviousness. "The mere fact that a reference can be combined or modified does not render the resultant combination obvious unless the prior art also suggests the desirability of the combination." *In re Mills*, 916 F.2d 680 (Fed. Cir. 1990); MPEP §2143.01.

Applicant also submits that Curtiss's cover does not substantially allow air, water and light to pass through, as claimed. A fair reading of Curtiss indicates that Curtiss's cover does not allow at least light and air to pass through the cover to any substantial degree. Curtiss teaches the use of his protective cover "[w]here it is desired to protect the tree and the fruit thereon from sunburn . . ." Curtis, col. 2, lines 107-109. Clearly, there would be little protection from "sunburn" if the cover were to substantially allow light to pass through. Curtiss explains that his cover is useful so that ". . . the fruit on the tree is protected against the direct rays of the sun . . ." Curtiss, col. 3, lines 12-13. Applicant submits that Curtiss teaches a cover that substantially blocks light rather than substantially allowing it to pass through.

Air cannot substantially pass through Curtiss's cover either. With respect to his Figure 4, Curtiss explains a technique for allowing air to circulate within the branches of the trees enclosed by the cover to provide adequate ventilation. He writes:

... the protective covering is arranged as illustrated in Figure 4, with the lower portion of the body 10 turned or folded upwardly and secured by means of the cord 13, and with the opening at the upper end of the member in full open position so that air may circulate freely through the space enclosed by the protective member and through the branches of the trees on which said member is positioned. It is at times desirable to prevent certain fruits, such as apricots and peaches, from ripening too quickly, and by using the protective covering on the tree as illustrated in Figure 4 the fruit on the tree is protected against the direct rays of the sun and at the same time the fruit has ample ventilation.

Curtiss, col. 2, line 108 – col. 3, line 15. Applicant submits that, if Curtiss's cover were to substantially permit air to pass through, there would be no need for the procedure that Curtiss describes to allow for ample ventilation. Thus, it appears from Curtiss's own description that the cover described substantially blocks air passage rather than substantially allowing it, as claimed.

Rejection of Claim 39 Under 35 U.S.C. §103(a) over Curtiss and Andros

Claim 39 stands rejected for obviousness over a combination of Curtiss and Andros. Applicant submits that claim 39 should be allowable at least as depending from an allowable base claim (claim 34).

Rejection of Claims 21-26 and 28-32 under 35 U.S.C. §103(a) over Curtiss and Morrisoe

Claims 21-26 and 28-32 stand rejected for obviousness over a combination of the Curtiss and Morrisoe references. The Examiner contends that Curtiss discloses the claims invention, except that the cover material is not a spun bonded polypropylene. She notes that Morrisoe discloses a weather protecting cover similar to Curtiss's, and teaches fabricating it from a spun-bonded polypropylene textiles. She notes that Morrisoe suggests that these textiles provide a more durable, longer-lasting product. She contends that it would have been obvious to use a spun bonded polypropylene instead of burlap in order to provide a more durable and dependable fabric.


Applicant traverses the rejection, as it might apply to the claims as amended herein. As amended, claims 21-25 and 28-31 recite methods of providing frost protection for a plant wherein the frost cover is made of a spun-bonded polypropylene material that is resistant to frost, but substantially allows air, water and light to pass through. This is not true of the covers of either Curtiss or Morrisoe and, therefore, combining these references would not result in the claimed invention. As noted previously, Curtiss's cover does not substantially allow either air or water to pass through the cover. Morrisoe's cover is actually impervious to water (see Morrisoe's abstract) and constructed so as to prevent "light penetration." See Morrisoe, col. 5, lines 32-33. Applicant submits that no combination of the two references would result in a frost cover having the claimed properties.

Rejection of Claims 27 and 33 under 35 U.S.C. §103(a) over Curtiss, Morrisoe, and Andros

Claims 27 and 33 stand rejected as obvious in view of a combination of the Curtiss, Morrisoe and Andros references. Applicant submits that claims 27 and 33 should be allowable at least as depending from an allowable base claim.

Respectfully submitted,

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